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Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance

DONALD L. BESCHLE*

INTRODUCTION

Courts and commentators engaged in constitutional analysis widely accept the proposition that federal constitutional norms should be uniform throughout the nation. While no consensus exists on whether various substantive constitutional principles should be applied broadly or narrowly, few dispute the claim that whatever the substantive outcome, it must be applied consistently. Diversity should be expected, perhaps even encouraged, in matters of state law, both statutory and constitutional.¹ However, most courts and commentators agree that federal law should mean the same thing regardless of the forum.

Nevertheless, legal scholars have rarely inquired into why federal law should have the same meaning in every forum. Instead, the value of uniformity has generally been treated as self-evident. Tolerance of diverse interpretations of federal constitutional provisions calls forth images of nullification and other pre-Civil War concepts of federal-state relationships long since rejected by history.² Justice Holmes' comment that the Supreme

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1. The legitimacy of local diversity of state law, even when it touches on federal interests, extends at least as far back as *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). The value of the diversity of state legislation has been hailed by political conservatives. *See, e.g.,* *Hammer v. Dagenhart*, 247 U.S. 251 (1918). In some instances, it also has been hailed by political liberals. *See, e.g.,* *Munn v. Illinois*, 94 U.S. 113 (1877). However, support often depends on which level of government was acting to regulate private activity.

The importance of diversity in state constitutional law has recently been recognized as a counterweight to narrow application of individual rights provisions of the Federal Constitution. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

2. Nullification was the contention that a state government had the "unquestionable right to judge" the constitutionality of acts of the federal government. And, if the state courts concluded that the acts were unconstitutional, then nullification gave them the right to strike "all unauthorized acts done under color of [the Constitution]." Resolution of the Kentucky Legislature (Nov. 14, 1799), reprinted in VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, *WE THE STATES* 155 (1964).

Nullification was closely linked to the theory that states had the right to secede. Both theories were, of course, defeated less by legal argument than by force of arms during the

Court's power to review state statutes challenged on federal constitutional grounds is more essential than its power to review the constitutionality of federal statutes³ may be the most famous remark expressing the fear of judicial balkanization of constitutional standards.

Attempts to go beyond reflexive rejection of diversity in constitutional standards to reach a reasoned elaboration of that position generally rest upon the supremacy clause.⁴ But that clause, while clearly a bar to state interference with the operation of federal constitutional or statutory law, is only a limited mandate for uniformity. The most common contemporary applications of the supremacy clause involve questions of whether federal law preempts state statutes addressing the same subject. In that context, although conflict with federal goals is impermissible, the supremacy clause clearly does not prohibit diverse state approaches which do not interfere with simultaneous enforcement of federal law.⁵ If states may supplement federal legislation, how does the supremacy clause bar state or lower federal courts from not only protecting, but also enhancing, federal constitutional guarantees through broader interpretation? Granted, interpretation of federal law is a different process than comparing federal law to parallel state law, but in what sense are federal aims frustrated by overextension of the federal norm in either case?

Two arguments, primarily utilitarian in nature, are commonly put forward in response. First, it may be argued that the Constitution cannot be allowed to "mean something different in each of the fifty states."⁶ This argument,

Civil War.

The war had . . . roused the spirit of nationality, until then but half conscious, into vivid life and filled every country-side of the North and West with new ardor for that government which was greater than the government of States. . . . It was not a theory of lawyers that had won . . . but the passionate beliefs of an efficient majority of the nation

10 W. WILSON, A HISTORY OF THE AMERICAN PEOPLE 14 (1918).

3. "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." O. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

4. The need for uniformity "finds its roots" in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *Martin* established the power of Supreme Court review over state court decisions, a power based in the Supremacy Clause. See *id.* at 348-50. See also Schlueter, *Federalism and Supreme Court Review of Expansive State Court Decisions: A Response to Unfortunate Impressions*, 11 HASTINGS CONST. L.Q. 523 (1984). For a summary of the history of Supreme Court review of state court decisions, see Elison & NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177 (1984).

5. See, e.g., *Pacific Gas & Elec. Co. v. State Energy Comm'n*, 461 U.S. 190 (1983) (state licensing scheme for nuclear power plants not preempted by Federal Atomic Energy Act); *DeCana v. Bica*, 424 U.S. 351 (1976) (state statute prohibiting employment of illegal aliens not preempted by Federal Immigration and Nationality Act).

6. *Resolution Relating to Proposed Legislation to Restrict the Jurisdiction of the Federal*

however, is less an explanation of the value of uniformity than a restatement of the conclusion that it is valuable.

The second argument states that to permit nonuniformity will lead to "confusion . . . as to whether and how federal acts will be enforced"⁷ from state to state. The importance of such confusion may well be overstated. The narrowest possible reading of the supremacy clause assures that states cannot undercut federal guarantees, but at most may supplement them. In addition, uncertainty over how far beyond minimum standards a state might go would be no more confusing than any other unsettled question of law which has yet to be resolved by a state's highest court. The federal system already tolerates a significant amount of "confusion" on the scope of individual rights and the validity of state statutes, given the increasing willingness of state courts to expand such rights through reliance on state constitutional provisions analogous to federal guarantees.⁸ With all these factors already present, it is difficult to understand how permitting non-uniform, expansive readings of federal constitutional provisions would unacceptably add to current uncertainty.

Still, judicial support for the principle of uniformity remains strong—far stronger than the explanations put forward for it. This Article will not dispute the importance of uniformity in the interpretation of constitutional rights provisions, but will attempt to articulate a more satisfying rationale than those commonly cited. This suggested rationale rests on the proposition that the people have an interest in the effective implementation of legislative decisions which do not violate constitutional prohibitions. This interest, created by the Constitution itself, is legitimately viewed as a right—a right to government institutions which, except insofar as limited by the Constitution, are basically democratic in nature.

The right of the citizen to effective implementation of democratic outcomes is, of course, properly subordinated to the individual rights created by the

Courts, Meeting of the Conference of Chief Justices, Williamsburg, Virginia (Jan. 30, 1982), reprinted in 128 CONG. REC. S.2242 (Mar. 17, 1982), cited in Schulzeter, *supra* note 4, at 545. This language dates to *Martin*, where the Supreme Court stated that if federal law "might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states, [t]he public mischiefs that would attend . . . would be truly deplorable." 14 U.S. (1 Wheat.) at 348.

7. *Resolution Relating to Proposed Legislation to Restrict the Jurisdiction of the Federal Courts*, *supra* note 6.

8. See Brennan, *supra* note 1, at 491. A recent prominent example involves New York State's attempt to close an "adult" bookstore as a public health nuisance after determining that solicitation and performance of sexual acts took place on the premises. In *Arcara v. Cloud Books*, 106 S. Ct. 3172 (1986), the Supreme Court held that the first amendment did not prohibit such a closure. *Id.* at 3178. The New York Court of Appeals then applied the free speech provision of the state constitution, N.Y. CONST. art. I, § 8, and unanimously held that the remedy of closing the bookstore went beyond the state's legitimate interest in enjoining illegal activity, and would therefore violate the defendant's rights. *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 510 N.Y.S.2d 844 (1986).

Constitution, which may be asserted against majorities. The scope of those rights will undoubtedly continue to be the source of sharp controversy. Expansion of individual rights may well reflect the evolving understanding of those rights not only by courts, but by the people as a whole. Such outcomes are clearly consistent with the overall constitutional scheme. However, expansive readings of individual rights provisions which are idiosyncratic, and which depart from contemporary views of what the provision means nationwide, not only interfere with the utilitarian benefits derived from the invalidated government practice, but on a deeper level deprive the citizens of the state involved of their right to effectively govern themselves within constitutional limits. It is this background right to an effective democracy within constitutional limits, the explicit recognition of which would have a significant effect on constitutional interpretation as a whole, which provides the foundation for the value of uniformity in constitutional interpretation.

This Article will first examine recent Supreme Court pronouncements on the need for uniformity in constitutional interpretation, as well as prominent critiques of those decisions. It then will discuss the constitutional structure and the rights, obvious and latent, created by that structure. Finally, this Article will discuss the implications of the right to effective functioning of the democratic system, along with some caveats about its application.

I. THE CURRENT DEBATE OVER UNIFORMITY

A. *The Supreme Court Defends Uniformity: Long and Hass*

The most important recent Supreme Court statements on the value of uniformity in federal constitutional interpretation are *Oregon v. Hass*⁹ and *Michigan v. Long*.¹⁰ In *Hass*, the defendant had been arrested for burglary, and given full *Miranda* warnings. During the ride to the police station, Hass asked to telephone a lawyer and was told that he could do so only after reaching the station. Before reaching the station, however, he provided the police with information which the prosecution later sought to introduce at trial to rebut the defendant's contrary testimony.¹¹ The Oregon Supreme Court, in reversing the conviction, held that the admission of the statements

9. 420 U.S. 714 (1975).

10. 463 U.S. 1032 (1983).

11. *Hass*, 420 U.S. at 717. Clearly, such evidence was inadmissible during the prosecution's case in chief under the principles of *Miranda v. Arizona*, 384 U.S. 436 (1966). However, in *Harris v. New York*, 401 U.S. 222 (1971), the Court limited the scope of *Miranda* in holding that "[i]t does not follow . . . that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes . . ." *Id.* at 224. The Court also held that, at least in certain circumstances, it could be used to impeach the credibility of defendant's testimony. *Id.*

made in the police car violated the fifth and fourteenth amendments.¹²

In its opinion reversing the Oregon courts, the United States Supreme Court dealt with the argument that a state had the power to extend individual rights against government action further than federal courts might do in the same circumstances. While the states' power to do so as a matter of state constitutional law was affirmed,¹³ the Court held that "of course, a State may not impose such greater restrictions [on government] as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."¹⁴ Apart from the citation of some lower court decisions to that effect, the Court's entire explanation of its holding on this point is the phrase "of course."

Justices Marshall and Brennan, dissenting, felt compelled "to add a word about this Court's increasingly common practice of reviewing state-court decisions upholding constitutional claims in criminal cases."¹⁵ The dissenters felt that it was "much the better policy to permit the state court the freedom to strike its own balance between individual rights and police practices, at least where the state court's ruling violates no constitutional prohibitions."¹⁶ While this statement was made to support the argument that the state court decision should have been presumed to be based on state law, it might also be applied to the question of whether federal courts should be concerned about state court overextension of federal constitutional rights.

12. *State v. Hass*, 267 Or. 489, 517 P.2d 671 (1973). In *Hass*, the Oregon Court distinguished *Harris* on the grounds that there, "insufficient or no warnings were given," while *Hass* had received proper warning. 267 Or. at 492, 517 P.2d at 673. Although on its face this makes the Oregon police more sympathetic actors, the court felt that after giving proper warnings, the police would have "had nothing to lose and something to gain by [then] violating *Miranda* unless they know that subsequent evidence is absolutely excluded." *Id.*

13. *Hass*, 420 U.S. at 719. The Oregon Courts, with Justice Hans Linde as their most prominent spokesman, see, e.g., Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984), have taken the lead in extending state constitutional rights provisions beyond their federal counterparts; Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). See, e.g., *State v. Harrington*, 67 Or. App. 608, 680 P.2d 666 (1984) (no "fighting words" exception to state freedom of speech provision); *Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 653 P.2d 970 (1982) (gender classifications subject to the same strict scrutiny as are racial classifications for equal protection analysis). In the wake of *Michigan v. Long*, 463 U.S. 1032 (1983), even when adopting a similar rule, the Oregon Supreme Court now goes out of its way to make clear that it is applying state law, and the Court uses United States Supreme Court cases only as persuasive precedent. See, e.g., *State v. Brown*, 301 Or. 268, 274, 721 P.2d 1357, 1360-61 (1986).

14. *Hass*, 420 U.S. at 719. The Oregon Supreme Court clearly believed otherwise. In *Hass*, the defendant relied upon *State v. Florance*, 270 Or. 169, 527 P.2d 1202 (1974). "If we choose we can . . . [interpret] Article I, § 9 of the Oregon constitutional prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the federal constitution. Or we can interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court." 270 Or. at 182, 527 P.2d at 1208, quoted in *Hass*, 420 U.S. at 719 n.4.

15. *Hass*, 420 U.S. at 726 (Marshall & Brennan, JJ., dissenting).

16. *Id.* at 728.

Long involved a police search of a car stopped for a speeding violation, which resulted in the discovery of marijuana. The Michigan Supreme Court reversed the defendant's conviction, holding that the evidence had been obtained illegally.¹⁷ The state court opinion was unclear as to whether its basis for this holding was state law, the fourth and fourteenth amendments of the federal constitution, or both state and federal constitutional law.

Before proceeding to the merits of the defendant's fourth amendment argument, the United States Supreme Court addressed the contention that it lacked jurisdiction under the doctrine of adequate and independent state grounds. This long-standing jurisdictional rule restrains the Supreme Court from addressing federal constitutional issues presented in a case coming from a state's highest court where the state court decision would stand based upon state law alone.¹⁸

Application of this doctrine is both easy and uncontroversial when the state court opinion is clearly based upon state grounds or, conversely, when it is clear that the outcome is based upon federal law.¹⁹ But for many years, the proper approach when the basis of the decision was ambiguous was in dispute. At different times, the Supreme Court advocated dismissal of any case not clearly lacking independent state grounds,²⁰ remand of the case to clarify the actual basis of the state court's decision,²¹ or an independent assessment of the case, by the Supreme Court itself, to determine whether adequate and independent state grounds were present.²² Each of these approaches carries both advantages and disadvantages.²³ However, each is more deferential to the possible existence of an independent state interest than the approach chosen in *Long*.

17. *People v. Long*, 413 Mich. 461, 329 N.W.2d 866 (1982). In *Long*, the defendant was stopped for speeding. The police had reason to suspect that he was "under the influence of something." The defendant had left the car and had been subjected to a pat-down search for weapons. Police saw a four-inch knife on the floor of the car, then shined a flashlight into the car to search for other weapons. After lifting an armrest, police found an open leather pouch containing a small plastic bag of marijuana. 413 Mich. at 468-70, 320 N.W.2d at 868.

18. In *Herb v. Pitcairn*, 329 U.S. 117 (1945), Justice Jackson found the rule to flow from the constitutional requirement that federal courts act only upon cases or controversies. Any judgment attempting to correct state law would be nothing more than an advisory opinion. See C. WRIGHT, *FEDERAL COURTS* ch. 12 (4th ed. 1983).

19. See, e.g., *United Airlines, Inc. v. Mahin*, 410 U.S. 623 (1973) (Supreme Court has jurisdiction where state court clearly decided on federal grounds); *Johnson v. New Jersey*, 384 U.S. 719 (1966) (no jurisdiction where state court invoked state procedural rule).

20. See, e.g., *Black v. Cutter Laboratories*, 351 U.S. 292 (1956).

21. See, e.g., *Department of Motor Vehicles v. Rios*, 410 U.S. 425 (1973).

22. See, e.g., *Texas v. Brown*, 460 U.S. 730 (1983).

23. These are discussed by the Court in *Long*, 463 U.S. at 1037-40. Outright dismissal grants deference to state courts, but it risks creating confusion over the scope of federal law. The United States Supreme Court, when examining the scope of state law, promotes uniform interpretation of federal law, but risks incorrect decisions based upon a body of state law unfamiliar to the justices. Remand for clarification promotes ultimate accuracy, but is inefficient.

The Court held that in ambiguous cases, it would assume that adequate and independent state grounds did not exist.²⁴ Whatever the “passive virtues” associated with other approaches, they apparently were outweighed by the Court’s determination that states should not be granted the power to interfere, even inadvertently, with the uniform national interpretation of federal constitutional provisions.²⁵ Legitimate state interests, said the Court, could be protected through the simple act of the state court explicitly stating, where appropriate, that it was relying upon independent state grounds.²⁶

In recent years, then, the Supreme Court has reaffirmed the necessity of uniform interpretation of federal constitutional provisions. In addition, in *Long*, the Court took steps to eliminate the inconsistent application of such provisions even where the decision would likely be seen in other states as an inconsistency dictated by state, rather than federal, law. Yet, typically on this matter, the Court did not feel compelled to explain the need for uniformity in either *Hass* or *Long*, apparently believing that it was too obvious to require elaboration.

B. Critiques of the Need for Uniformity

A few voices have challenged the proposition that uniform interpretation of federal constitutional provisions is always necessary, or even wise. Justice Stevens set forth his position in his *Long* dissent. There, he argued that uniformity in the enforcement of constitutional rights is clearly called for to the extent that all states must provide the individual with the minimum degree of protection assured by Supreme Court decisions. But if a state court chooses to be more generous to the individual, Justice Stevens contends that no serious federal interest is compromised by deference to that state’s decision.²⁷ In *Long*, he stated:

The reason may be illuminated by assuming that the events underlying this case had arisen in another country, perhaps the Republic of Finland. If the Finnish police had arrested a Finnish citizen for possession of marijuana, and the Finnish courts had turned him loose, no American would have standing to object. If instead they had arrested an American citizen and acquitted him, we might have been concerned about the arrest but we surely could not have complained about the acquittal, even if the Finnish court had based its decision on its understanding of the United States Constitution. That would be true even if we had a treaty with Finland requiring it to respect the rights of American citizens under the United States Constitution. We would only be motivated to intervene if

24. *Id.* at 1040-41.

25. *Id.*

26. *Id.* at 1041. State courts have followed this suggestion. See *supra* note 13.

27. *Long*, 463 U.S. at 1065-72 (Stevens, J., dissenting).

an American citizen were unfairly arrested, tried, and convicted by the foreign tribunal.²⁸

In short, Justice Stevens sees the case for uniformity as resting upon the need to protect federal interests, including the individual's federally guaranteed rights. Under these circumstances, he contends, uniformity is needed only "to vindicate federal rights."²⁹ No federal interest is challenged by overenforcement of individual rights, and therefore the proper attitude of the federal courts in such cases should be one of disinterest.

Professor Lawrence Sager has set forth a more nuanced critique of the need for uniformity.³⁰ He contends that the failure of a court to extend constitutional protection is often based not upon a conclusion that the constitutional provision relied on would not support the claimed right, but rather upon various non-analytical, institutional grounds. Institutional reasons for limiting enforcement of individual rights provisions generally involve the belief that it would be inappropriate to extend the right in light of the practical difficulties or consequences of such an action.³¹

Where the Supreme Court has apparently refused to expand constitutional protection of the individual based upon institutional grounds, Professor Sager would recognize the constitutional norm in question as "underenforced." If a state court chooses to go beyond the level of federal enforcement with respect to such norms, the Supreme Court should not, he contends, feel compelled to interfere. Such state interpretation of federal constitutional provisions would not violate any constitutional norm, but merely indicate that an independent sovereign court system feels less constrained by institutional limits than does the Supreme Court.³²

To Professor Sager, the loss of uniformity would not be a decisive objection to such decisions. Uniformity is unimportant in itself, and required only where nonuniformity would damage some independent government

28. *Id.* at 1068.

29. *Id.* (emphasis in original).

30. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

31. Institutional reasons are those "based upon questions of propriety or capacity." *Id.* at 1217. Professor Sager does not attempt to provide a laundry list of institutional reasons. They seem to be the types of things that the Supreme Court has explicitly taken into account in determining that something is a nonjusticiable "political question." See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962). Professor Sager explicitly refers to the arguments for abstention by federal courts put forth by Alexander Bickel in praise of the "passive virtues." See A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). However, Professor Sager believes that these justiciability issues are not always described as such, but rather cause courts to limit the substance of various constitutional concepts.

32. Sager, *supra* note 30, at 1248-50. Professor Sager also contends that Congress can and should use its power under section five of the fourteenth amendment to go beyond the point at which the Court has stopped enforcing, for institutional reasons, the substance of the amendment. This part of his argument is not directly relevant to the issues discussed in this Article, and is not inconsistent with the thesis set forth here.

interest. Increased vigor by state courts in guarding federal rights, even beyond the protection extended by federal courts, would be and should be of no concern to the federal courts.³³

Both Justice Stevens and Professor Sager reject the notion that uniformity in constitutional interpretation is always an important goal, but their positions differ significantly. Professor Sager limits his endorsement of non-uniformity to cases where federal courts have set limits for institutional reasons. He sees cases involving police practices, such as *Hass*, as generally decided upon analytical grounds. That is, rather than simply refusing to enforce the full measure of an individual right, the Court has chosen to mark the constitutional boundary between that right and the legitimate interests of the state. In such cases, uniformity remains important. Justice Stevens seems to go further. His dissent in *Long* appears to maintain that excessive zeal in protecting individual federal rights by state courts simply presents no genuine federal problem, at least where the countervailing interest asserted is that of a state, rather than the right of another individual.³⁴

Arguments against the importance of uniformity in interpretation of federal constitutional provisions, while uncommon, are initially attractive. This is true principally because the defenders of uniformity so often have not bothered to explain its value, but have merely asserted it as self-evident. Is Justice Stevens correct in his position that state-court extension of federal constitutional rights should be of no concern to the Supreme Court, or is Professor Sager's more nuanced position (that this is only sometimes true) valid? Defending uniformity against either or both positions requires a convincing explanation of why constitutional values demand uniform application of federal constitutional guarantees.

II. WHY UNIFORMITY?

The importance of uniformity in constitutional interpretation can be assessed only against a more general understanding of the nature and structure of the constitutional system. The central paradox of the United States Constitution is that it simultaneously grants and restricts government power.

33. "Unless competing constitutional concerns are at stake, there would seem to be no occasion for an abiding federal judicial role in policing state courts against overly generous interpretations of federal constitutional values" *Id.* at 1249. Nonuniformity, in itself, is not an effective objection to this proposition, since broad, nonuniform readings of individual rights, when based on state law grounds are not only tolerated; "we often consider it a virtue." *Id.* at 1251.

34. See *supra* notes 27-29 and accompanying text. According to Professor Sager, some provisions of the constitution do not call for "underenforcement analysis," including the fourth amendment (at issue in *Long*) "which explicitly calls for a case-by-case balancing of state and private interests." Sager, *supra* note 30, at 1244 n.104. Underenforcement for institutional, rather than analytical reasons, is most likely with respect to equal protection and substantive due process claims. *Id.* at 1245 n.105.

Unlike the Magna Carta, it was not a document meant to weaken a previously powerful ruler, but rather was intended to strengthen institutions perceived as ineffective at the time. Yet the powers granted are seriously restricted by procedural restrictions and substantive prohibitions; the same governmental power which was desired was also feared and restricted.

While the grants of power and the restrictions on power were inextricably linked in the same document, the common justifications for each have tended to differ in at least one central way. Limits on government power are generally justified as necessary to protect individual rights, rights commonly seen as preceding the establishment of any government structure, or at least preceding that particular structure established in 1787.³⁵ Grants of government power, on the other hand, are usually justified on utilitarian grounds.³⁶ Since its inception, the Constitution has generally been interpreted as an attempt to balance the practical benefits attainable only through strong government institutions against the threats that such institutions will inevitably pose to the freedom of individuals, families, or other groups of citizens.³⁷

Although these premises have often served constitutional analysts well, they also create some difficulties. Despite the best efforts of such widely diverse thinkers as those of the "law and economics" school, who often see rights as based in utilities,³⁸ or scholars classified as members of the Critical

35. Thus, the prevailing view is that the principles of the Bill of Rights and the Declaration of Independence were rooted in theories of natural law and natural rights, particularly as developed by John Locke. See generally Corwin, *The Higher Law Background of American Constitutional Law*, in 1 CORWIN ON THE CONSTITUTION 79 (R. Loss ed. 1981). John Reid, on the other hand, argues that the colonists saw themselves as acting not on the basis of natural law, but rather to assert positive legal rights of English subjects, "established by custom and proven by time." Reid, *The Irrelevance of the Declaration*, in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 46, 61 (H. Hartog ed. 1981). Each theory maintains, at least, that certain rights pre-dated 1787. Whether individual rights are seen to flow from natural law and Lockian reasoning from first principles, or from history, custom and general acceptance through time will, of course, be of enormous importance in the task of defining the list and scope of those rights. See *infra* Section III.

36. Hamilton, in the first of the Federalist papers, states his general purpose as being "to discuss . . . [t]he utility of the UNION to your political prosperity—[t]he insufficiency of the present Confederation to preserve that Union—[t]he necessity of a government at least equally energetic with the one proposed, to the attainment of this object" THE FEDERALIST PAPERS No. 1 (A. Hamilton) (emphasis in original). Thus, grants of power were desirable only insofar as they efficiently brought about other goods, including "additional security . . . to the preservation of [republican] government, to liberty, and to property." *Id.*

37. This is true not only in the United States, but in every government committed to constitutionalism. "Constitutional history is usually the record of a series of oscillations. At one time private right is the chief concern of the citizens; at another the preventing of disorder that threatens to become anarchy" C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 136 (1947).

38. See generally R. POSNER, THE ECONOMICS OF JUSTICE (1981). Posner sees wealth maximization as a "foundation not only for a theory of rights and remedies but for the concept of law itself." *Id.* at 74.

Legal Studies movement, who see rights as radically contingent rather than universal,³⁹ the general outlines of western natural rights theory relied upon by the framers continue to dominate constitutional analysis. Under this approach, as long as limits on government power are seen as protecting rights and grants of government power as protecting utilities, then limits will be, at least in theory, uniformly valued over grants.

Traditionally, all legal claims have been divided into two supposedly distinct categories, rights and interests. Rights, while preferably given explicit recognition in positive law, are based in something preceding that law, and usually preceding even the community which enacts the positive law. That something has most commonly been designated as God, nature, or the primacy of the individual.⁴⁰ Arguments for incorporating rights into positive law are seen as properly limited to rational deductions from initial universal propositions about human nature. Interests, on the other hand, are based merely upon desires or preferences, and therefore have no claim to recognition beyond the fact of their incorporation into positive law. Additionally, arguments for incorporating interests into positive law may legitimately be made merely on the basis of their benefit to the proponents or others. Given such a framework for analysis, it is hardly surprising that even the legal positivist will conclude that in legal analysis, rights should always "trump" interests. This assertion stands at the foundation of liberal constitutional thought.⁴¹

Although the principle that a right always prevails against an interest is significant, it is also quite limited. It does not, of course, aid us in properly classifying claims as one or the other. Without extensive further elaboration, this principle provides no basis for resolving disputes in which a right is set against another right.⁴² Just as obvious, though less remarked upon, is the fact that the rights-interests duality conveys the message that all interests, all "non-rights," are also of equal dignity. The law, as opposed to politics, has no reason to favor one over another, except as instructed to do so by the political branches of government. Finally, the bifurcation of legal claims

39. See *Critical Legal Studies Symposium*, 36 *STAN. L. REV.* 1 (1984).

40. For a discussion of these various elements, see several of the essays in *NOMOS XXIII: HUMAN RIGHTS* (J. Pennock & J. Chapman eds. 1951) [hereinafter *HUMAN RIGHTS*].

41. Perhaps the most prominent example of this fact is the influential work of the self-described liberal thinker Ronald Dworkin. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

42. This will commonly be characterized as a "balancing test." But balancing tests can provide so little guidance as to how to proceed and what type of weight to assign to various interests that they justify the cynicism which they attract, not only from critics who doubt the value of the entire enterprise of liberal rights theory, but from the mainstream of American law. Justice Rehnquist, in dissenting from the Court's application of the balancing test to assess the validity of state regulation of interstate commerce, stated that the test, as applied by the Court, meant that "the only state truck-length limit 'that is valid is one which this Court has not been able to get its hands on.'" *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 687 (1981) (Rehnquist, J., dissenting).

into rights and interests leads us to downplay the connections between the two, connections which should be readily conceded even by those most intent on maintaining both as separate categories.

The first connection between the two types of claims has already been noted. When an interest is incorporated, through valid procedures, into positive law, that interest is entitled to the status of a legal right, at least to the extent that it does not conflict with a claim of right based upon considerations more worthy of respect than positive law.⁴³ Indeed, classic legal positivism would make enactment of a claim at least a necessary, if not a sufficient, condition for recognizing a right to that claim.⁴⁴ While natural law or natural rights theory would not consider positive recognition as essential to the existence of a right, it clearly does not view such recognition as unimportant. Except at their most abstract, natural rights theorists are largely engaged in urging those with positive lawmaking power to recognize and protect natural rights through positive enactments.

To a legal positivist then, because rights depend on formal recognition, the most important right of all might be described as the right to participate in the process of enacting claims into law and thereby transforming them from mere interests into rights. Without such a right all of the individual's other rights are merely matters of grace from the lawmaker. With such a right, however, the individual may actively participate not only in securing present rights, but also in obtaining rights not yet recognized as such. Thus the right to participate in lawmaking, the process which creates rights, is of central importance.

The natural rights theorist will not go so far. In theory, participation in the making of positive law will be seen as less important than it is to the legal positivist, since the lawmaker is limited by the demands of natural law or the existence of natural rights. But in practice, the ability to participate in bringing about recognition of natural rights must be of great importance to the natural rights theorist who wishes to live in a just society. While the ability to so participate may not here be described as the most important right, it clearly is of great importance, and can readily be seen to be one of the natural rights of the citizen.

Anglo-American thought concerning human rights almost invariably starts with a consideration of the needs of the autonomous individual.⁴⁵ This has

43. Thus, even the critic of positivism will readily concede that often the existence of a statute is itself sufficient to establish a right or duty, "that statutes have the general power to create and extinguish legal rights . . ." R. DWORKIN, *supra* note 41, at 105-06.

44. To H.L.A. Hart, the most prominent modern positivist, a command achieves the status of law when it is enacted pursuant to some accepted "rule of recognition," a rule which governs how rules are made. See H.L.A. HART, *THE CONCEPT OF LAW* 97-120 (1961).

45. See generally HUMAN RIGHTS, *supra* note 40 (a collection of papers prepared for the American Section of the International Association for the Philosophy of Law and Social

led, quite naturally, to a tendency to regard a right as something which can, or at least should, be brought into existence solely through the exercise of individual will. Activities undertaken in community with others, activities which depend for their eventual success upon agreement and participation by others, tend to be listed on the "non-rights" side of the ledger by those accustomed to dividing claims into rights and non-rights. Yet the autonomous individual does not exist, and apart from fiction and philosophical theory, never has. Humanity is exercised only in some form of community. It is strange to begin discussion of human rights with the autonomous individual not only because of the artificiality of such a person, but also because without the need to relate to others the need to discuss the question of rights simply does not exist. Perhaps an even more intriguing question than whether a falling tree makes a noise even if it is unheard is whether anyone can have a right without someone else present to put forward a claim denying or limiting it.

If some sort of community is necessary not only for human existence but also for the meaningful existence of a right, then the discussion of rights requires discussion of government institutions as much as it requires discussion of the nature of the individual. Commentators have recognized this fact, but often in a very limited way. Rights in the American system are seen as primarily, if not exclusively, negative rights—that is, the right to be protected from government action.⁴⁶ The existence of affirmative rights, rights to compel government to provide benefits, is much more controversial. However, this common distinction misses the way in which negative rights are similar to affirmative rights. Negative rights negate the power of the political branches of government, but they are affirmative with respect to the judiciary. When the criminal defendant asserts a negative right against

Philosophy). William Winslade argues that human rights grow out of "vital human needs." *Id.* at 24-37. W.T. Blackstone defines "human rights," and distinguishes them from "legal rights," by stating that they arise from the individual's status as a human being, and are "not contingent upon membership in a legal political community." *Id.* at 90. This type of reasoning is shared, it seems, by positivists. Hart has written that the basis of all liberal rights talk is "that all men have an equal right to be free." Hart, *Are There Any Natural Rights*, *PHIL. REV.*, Apr. 1955, at 175, 176. And this is not limited to Anglo-American sources. Otto Gierke has written that:

[t]he fixed first principle of the natural-law theory of society continued to be the priority of the Individual to the Group—a priority all the more readily assumed because the state of society was universally held to be derived from a previous state of nature, in which it was supposed that no real group had existed. . . . Men were originally free and equal, and therefore independent and isolated in their relation to one another.

O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY* 96 (E. Barker trans. ed. 1958).

46. This proposition nevertheless has been challenged at times. See, e.g., Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 *HARV. L. REV.* 1065 (1977).

the activity of the prosecutor, he does so by calling for action by the courts; he asserts an affirmative right to court action.

When we deny the existence of affirmative rights, we cannot be maintaining that there is no right to compel government activity, but only a right to prevent it, since the enforcement of negative rights is itself government action which can clearly be compelled. When an affirmative right is denied, what is actually being determined is that in this case, an individual does not have the right to compel government activity by his own demand. We typically use the word "right," then, to speak of a government action which can be compelled by an individual. Outcomes which depend on the agreement of others are non-rights.

Under such a system, rights invariably will be associated with the functions of the judicial branch, non-rights with the political branches. However, this masks the extent to which the functions of the political branches also involve rights, even in the strong sense of the word, as individual claims which must be recognized. When a claim of right is made, the typical claimant is actually saying three closely related, but distinct, things. Let us take as an example a criminal defendant accused of violating a statute which he claims is unconstitutional. First, and most obviously, the defendant claims to be entitled to a particular outcome—that is, a favorable judgment. But he is also claiming two other things. Our defendant claims the right to make his claim before the proper government body, and also claims the right to have his claim, if upheld, effectively enforced. If either of these latter conditions do not apply, recognition of the initial claim is worthless.

*Marbury v. Madison*⁴⁷ can be seen as the most prominent recognition that the typical claim of right is actually a claim of three closely related rights: the right to a particular outcome, the right to seek that outcome, and the right to have the outcome effectively carried out. While Chief Justice Marshall's opinion denied that Marbury had the right to seek his claimed relief in the particular forum he chose, the opinion is, on the whole, a forceful affirmation of the need to protect the less obvious parts of the constitutional litigant's claim, that is, the right to be heard and the right to have the proper outcome carried into effect.⁴⁸

A claimant before the political branches is obviously making a far different type of claim. No individual can assert the right to a particular outcome before the legislature. Legislative outcomes are the product of the aggregated claims of an effective majority. But to focus on this difference is to ignore

47. 5 U.S. (1 Cranch) 137 (1803).

48. Prior to holding that Marbury had sought an inappropriate remedy, the Court quotes Blackstone: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Id.* at 163. The most sweeping statement that the political branches are constitutionally bound to implement court rulings was set forth in *Cooper v. Aaron*, 358 U.S. 1 (1958).

the similarities between the claimant before the courts and the claimant before the legislature. Each of them makes two claims that the constitutional system does recognize: the right to press the claim and the right to have the substantive claim, if recognized, effectively implemented. These latter claims are just as properly designated rights as is the claim made by the litigant (but not by the participant in the political process) to a particular outcome regardless of the agreement of others making claims before the court.

Most constitutional scholarship has dealt explicitly with claims of rights to particular outcomes. These rights are often found to exist in litigation, but almost never found to exist in the political process.⁴⁹ The right of litigants to have access to a court and to have a favorable decision enforced have been clearly recognized, at least since *Marbury*. The last two decades have seen a major increase in awareness of the importance of access to the political system. Constitutional scholars, most prominently John Hart Ely, have recognized the central importance of participation in the legislative process to the constitutional system. While the Constitution does not mandate particular legislative outcomes (except in the sense that some are forbidden), it does mandate, through the equal protection clause and other provisions, that the process of legislation be open to all citizens.⁵⁰ Thus, the right to participate in the process has been clearly recognized to be, in all respects, a right. Ely, in fact, goes so far as to contend that it is the central right which should guide interpretation of the scope of all of the open-ended rights provisions which are at the heart of the most controversial constitutional disputes of recent years.⁵¹

Thus, a right to participate in the legislative process, apart from the right to obtain a particular outcome, has been recognized. It has not yet been widely recognized, however, that the third part of a possible rights claim, the right to effective implementation of rights acknowledged by the government, is also properly thought of as a right. It is somewhat surprising, given the uncontroversial nature of the assertion that a litigant is entitled to effective implementation of a favorable court decision, that it is not more explicitly recognized that the citizen who prevails in the legislative process has a similar right. However, given the nature of rights analysis with its

49. Nevertheless, some rights to positive legislative outcomes are recognized, at least in general terms, in the *Universal Declaration of Human Rights of the United Nations*, contained in Part A of Res. 217 (III) of the General Assembly, enacted Dec. 10, 1948 (recognizing rights to adequate standard of living, free education, reasonable limitation of working hours and others). See U.N. CHARTER art. 55. Some state constitutions also require that government must provide certain services to its people. See Langdon & Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 332-35 (1985).

50. See *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173 (1979); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

51. See J. ELY, *DEMOCRACY AND DISTRUST* (1980).

foundation in the autonomous individual, it is not altogether unexpected that this should be true.

The right of access to the political process is similar to the right of a litigant before a court. It owes its existence, quite obviously, to the claim of a single individual to its recognition. But implementation of positive rights enacted by the legislature depends, of course, on the activity of that body and ultimately, upon an effective majority of the community. We are reluctant to assign the term "right" to something which owes its existence to the majority. But if we fail to do so, we seriously undermine the recognized right of the individual to participate in the political process, a right which might be redefined as the right to participate in the process of determining which substantive rights will be created, or recognized, by positive law.

Liberty is most often thought of as closely akin to privacy, or "the right to be left alone."⁵² But freedom from interference by others is rarely an end in itself. Rather, it is a condition conducive and possibly necessary to the accomplishment of some other goal. The negative right of liberty is linked to a desire to act in some positive way to fulfill goals. Even if possible altruistic goals are put aside, self-fulfillment will often be possible only with the assistance of government. Without the organized efforts of others, the individual may be powerless to remove obstacles posed by other individuals, or by impersonal forces such as ignorance or dire poverty, which prevent advancement of his concept of a satisfying life.

The proper functioning of the political branches, with their "active virtues,"⁵³ is not something separate and distinct from individual rights. The proposition that each branch of government, as long as it is acting within its constitutional powers, may act effectively should not be seen merely as a "right" belonging to that institution, but as a necessary principle to make meaningful the right of the citizen to participate in government. While it seems clear that, aside from labelling certain legislative choices as impermissible, the Constitution does not guarantee any particular legislative outcomes, the effective functioning of the process by which discretionary legislative choices are made is itself of a higher order than any particular outcome. Since the right to participate in the decisions of the political branches is worth little if properly enacted statutes are not carried into effect, it must follow that the citizen has some kind of right that majoritarian decisions not be interfered with unless they violate some other constitutional right. Although government itself will act to assert this right, it does so on behalf of the citizen, the actual holder of the right.

52. The right to privacy has been called "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

53. Contrast these attributes to the "passive virtues" of courts praised in A. BICKEL, *supra* note 31.

The use of the terminology of rights here may be initially troubling. We are accustomed to "balancing" rights when they appear to conflict, with sometimes one, sometimes the other of the conflicting rights prevailing. Will recognition of a right to effective implementation of majoritarian outcomes pose a serious threat to the preservation of traditionally recognized rights of the individual to be free of majoritarian constraints? This need not be so if the right to enforcement of majoritarian outcomes is seen as a right of a distinct kind. The distinction can be drawn by the use of a distinctive term; this right may be designated as a "background right."

A background right relates not to any particular substantive outcome produced by the system, but rather to the proper functioning of the system itself. It is a right in the sense that it is of greater constitutional weight than any particular statutory enactment. Nevertheless, it remains "in the background" and is of less constitutional weight than the specific limits placed on the substantive outcomes of the legislative process by the antimajoritarian individual rights provisions of the Constitution. This leaves no room for balancing an antimajoritarian right against background rights; once the former is established it will always prevail. To this extent, a background right has no greater weight than an interest under a traditional, bipolar, "rights-interests" analysis.⁵⁴ But the background right demands respect where it is not countered by an exception in the form of an antimajoritarian right. This should be recognized as a central constitutional principle. Citizens have a right, not merely an interest, to their majoritarian choices insofar as those choices have been properly enacted into law and are not inconsistent with other constitutional guarantees.

The designation of effective functioning of the political branches as "rights" of any kind will still seem strange, in light of the fact that rights, at least in American constitutional thought, are seen as claims against the government. In what sense is the claim of a background right such a claim? Is it not, rather, a claim by the government to an extension of power? Clearly, claims of antimajoritarian rights are enforced against government. But they are specifically enforced against the political branches of government. The act of enforcing these rights is also a claim to an extension of power by a branch of government, that is, the judiciary. Thus, the traditional rights claim is not simply a matter of an individual standing against the state, but rather involves the individual calling upon one arm of the state to exercise, on his behalf, its power to override another arm of the state. Still, we have no great difficulty recognizing this as the exercise of an individual's right.

54. Ronald Dworkin denies that the term "right" can be applied in the same sense to both the individual's claims against the government and a citizen's "right to have the laws of the nation enforced," since this would lead to pervasive balancing which would make the individual's right largely worthless. R. DWORKIN, *supra* note 41, at 194. No doubt the right to the enforcement of statutes is of a different nature than antimajoritarian rights.

In the same way, the demand for recognition of a background right involves a claim that one arm of the state legitimately may stay the power of another arm. But here the roles of the branches of government are reversed, which makes the claim seem strange. Antimajoritarian rights are secured through the activity of courts, and the deference of the political branches. Background rights to a democratic system are secured by the deference of courts to those same political branches. Neither case is a pure example of a person or group of people standing against a unitary entity known as the state. On the contrary, each exemplifies the proper use of part of the machinery of the state to assure protection for the rights of the people involved against attempts by other parts of the state to frustrate those rights.

The key difference between traditional antimajoritarian rights and the background right of the people to enforcement of properly enacted democratic outcomes lies in the different roles assumed by the different branches of government in each case. Where an antimajoritarian right exists, the courts have the duty to respond to the claim of an aggrieved individual, and it is generally accepted that the political branches have the duty to respect the court's decision.⁵⁵ Where no restraint on the majority exists, the political branches have the duty to be responsive to the claims of the majority for legislative action. And the accompanying duty of the courts, in such a case, is to defer to the legislature. This deference should not be seen as a matter of discretion, but rather as a duty, imposed by the Constitution through its grant to the people of the background right to properly enacted, constitutional, democratic outcomes.⁵⁶ Such a duty is just as compelling as the duty of the political branches to respect the proper exercise of judicial power. In either case, failure to respect the other branch does not merely injure the institution of the state, it interferes with the rights of people. This is well recognized in the case of the "negative" rights of the individual to be free of unconstitutional restraints. It should be equally well recognized in the case of the "positive" rights of the people to choose whatever constitutional government outcomes they prefer.

Once we recognize the effective implementation of properly enacted and constitutional democratic outcomes as a right belonging to the citizens who supported that outcome, rather than simply an interest of the state as distinct from its citizens, the importance of uniform interpretation of federal constitutional provisions becomes clear. If people have a right to the preservation

55. This has not always been a universally held view. See G. GUNTHER, *CONSTITUTIONAL LAW* 21-26 (11th ed. 1985). However, it is now certainly held by the Supreme Court itself. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

56. The duty, pursuant to Article VI of the Constitution, referred to by John Marshall in *Marbury* is to "administer justice" in conformance not only with "the constitution," but also, of course, with the "law of the United States." *Marbury*, 5 U.S. (1 Cranch) at 180.

of proper majoritarian outcomes (just as they have the right to the invalidation of unconstitutional majoritarian outcomes), then unjustified expansion of antimajoritarian rights provisions is not, as Justice Stevens sees it in his dissent in *Long*,⁵⁷ a harmless error which threatens no legitimate federal interest.

The flaw in Stevens' analogy of the relationship between federal and state courts, on the one hand, and the relationship between courts of different nations, on the other, is obvious. It is correct to say that if the courts of Finland should free a United States citizen based upon an overly expansive reading of an individual rights provision of the United States Constitution, our courts would have no legitimate interest in overturning the decision, and seeing to it that the American suffer the appropriate consequences of his illegal activity in Finland. But that is true primarily because the United States Supreme Court has no duties which run to the people of Finland; specifically, no duty to see to it that properly adopted Finnish legislative choices are upheld.

This situation is not properly analogized to the case of a state court, or lower federal court, releasing such a defendant based upon a similar expansion of a claimed constitutional right. In such a case, failure to reverse the incorrect decision interferes with the background rights of United States citizens to effective implementation of constitutional legislative choices. In reversing the lower court, the Supreme Court is not acting to elevate non-rights over rights, or even to elevate its institutional claims over those of state courts, but rather to elevate the rights of the people over an invalid claim of an individual right. Here, unlike the hypothetical case involving the courts of Finland, the Supreme Court does have a relationship and a duty to the citizens whose legislative choices are frustrated by the incorrect judicial application of the Constitution.

This argument does not necessarily mean that uniformity must always prevail. It does not seem, for example, essentially inconsistent with the core of Professor Sager's critique of the Supreme Court's eagerness to police lower court "overenforcement" of individual rights. Professor Sager's basic position is that there is no need to police "overly generous interpretations of federal constitutional values" except where "competing constitutional concerns are at stake."⁵⁸ As noted above, Professor Sager believes that there are no such competing concerns when the state or lower federal court has rejected "institutional" rather than "analytical" reasons for limiting the scope of an individual right. Institutional reasons are practical, and distinct from the conclusion that analysis of the right claimed indicates that it should not extend to the case at issue. This bifurcation of reasons for denying

57. See *supra* notes 27-29 and accompanying text.

58. Sager, *supra* note 30, at 1249.

constitutional claims allows Professor Sager, unlike Justice Stevens, to see, for example, Supreme Court decisions restraining the scope of rights of criminal suspects as generally being analytical, and therefore not properly the subject for more expansive state court treatment.⁵⁹

Thus, Professor Sager's position does not appear inconsistent with the existence of the citizen's background right to effective enforcement of constitutional legislation. If the Supreme Court has refused to act for purely "institutional" reasons when confronted with a claim of constitutional rights, then the challenged legislation or practice may well be unconstitutional. As we have seen, the citizens' background right extends only to the implementation of constitutional legislation. In such a case, if uniformity is called for at all, it cannot be due to the obligation to respect background rights. However, failure to recognize the existence of the background right is significant because in its absence, the tendency of courts, accustomed to bipolar rights-interests thinking, may well be to lean unduly toward characterizing contrary Supreme Court precedents as being "institutional" decisions. After all, such an incorrect characterization will offend only majoritarian interests, rather than anyone's right. The explicit recognition of the background right to effective implementation of constitutional legislation as a possible "competing constitutional concern" should lead state and lower federal courts to be very cautious in finding that Supreme Court limitations on individual rights are based solely upon institutional reasons. Background rights do not negate the possibility of rare instances of "underenforcement" which may be expanded upon by state and lower federal courts, but they do call for great care in the invocation of such a theory.⁶⁰

The structure of the Constitution clearly indicates that despite substantive limitations and procedural hurdles, the people have, in general, the right to choose to promote the welfare of their community through proper legislation, and through the election of responsive executive officers. When properly enacted, constitutional legislation is not implemented because of court intervention, the damage is not simply to an abstraction called "the state." In such a case, the right of the citizen to effectively govern himself and his community, a right which remains in the background of the constitutional system, is infringed. This background right provides a solid explanation of the importance of uniformity in the interpretation of federal constitutional rights. But the general elevation of majoritarian outcomes above the status

59. *Id.* at 1244-45 n.104.

60. However, such cases would be limited to those in which the Supreme Court has clearly acted for procedural reasons such as lack of standing, mootness or a finding that the case is not ripe. This is not the type of underenforcement at the heart of Professor Sager's article. The theory would not affect his contention that Congress may, through its constitutional powers under section 5 of the fourteenth amendment, expand the protections of the substantive provisions of that amendment. *See id.* at 1228-42.

of mere "interests" in rights-interests analysis will, no doubt, spark objections. At the same time, the concept of such a background right has implications beyond the narrow issue of uniformity. This Article will now briefly address each of these points.

III. IMPLICATIONS OF A BACKGROUND RIGHT TO EFFECTIVE DEMOCRATIC PROCESSES

No doubt, there will be some serious reluctance to label as a "right" any principle which calls for respect, rather than invalidation, of democratic outcomes. Any blurring of the distinction between individual rights and majoritarian interests, it may be contended, will most likely lead to undue restriction of important antimajoritarian rights. Every inquiry into the scope of an individual right will now become a balancing test pitting the individual right against a competing background right, and the important principle that rights invariably trump interests will be lost.

Such an outcome is possible, but only through misuse of the background rights concept put forward here. This misuse might arise out of misunderstanding or out of simple hostility to broadly defined antimajoritarian rights. Those who hold the latter view already have a broad range of arguments at their disposal. There is little that can be done about an advocate's likely misuse of a concept for his own ends. But misuse through misunderstanding can be avoided by clear restatement of the principle that background rights are not conceptually the same as antimajoritarian rights. They are not to be balanced against antimajoritarian rights in a court's analysis of the meaning of those rights provisions of the Constitution. The principle of background rights comes into play only after a court has determined that the legislative or administrative act in question is constitutional; it is not properly a part of the assessment of the question of constitutionality itself. Thus, the principle of background rights gives the citizen the right to the enforcement of constitutional majoritarian outcomes, not the right to the enforcement of all majoritarian outcomes.⁶¹

Although the concept of a background right to effective democratic processes cannot be invoked to limit explicit constitutional provisions meant to serve as antimajoritarian checks upon that principle, it may be of great assistance in interpreting other constitutional provisions. Much of the Constitution deals with the distribution of legislative power between the states and the federal government, the balance of policy making power between the executive and legislative branches, and other structural questions. Several

61. See *supra* note 44 and accompanying text.

of these structural issues, such as the scope of the tenth amendment⁶² and the constitutionality of the "legislative veto"⁶³ have been matters of sharp dispute in recent years. Unlike most of the antimajoritarian individual rights provisions of the Constitution,⁶⁴ structural provisions are often best viewed as means rather than ends in themselves. Interpretation of those provisions should take into account the principle of a background right. Structures are not ends in themselves, but exist to protect someone's rights. If the practice in question does not violate an individual's antimajoritarian rights, then structural questions should be decided to favor the background right of effective democratic processes, rather than to serve some abstract concept such as "states' rights" without a showing of how such a concept protects individual rights in the political arena.⁶⁵

In addition to illuminating interpretation of structural provisions, the concept of a background right to effective democratic outcomes may be of significance in helping define the scope of individual rights not explicit in the text of the Constitution. Far from being a threat to antimajoritarian rights, the concept could provide a firm basis for the recognition of additional rights. The most hotly contested question of constitutional interpretation in recent years has been whether such nontextual rights exist, and if so, just

62. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. After decades of lying dormant, the provision has been the subject of renewed interest and dispute. See *National League of Cities v. Usury*, 426 U.S. 833 (1976) (striking down, for the first time in modern constitutional history, a federal statute pursuant to the amendment), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

63. The once commonly used device by which Congress would delegate decision making power to the executive branch, but retain the right to overrule decisions made in a particular case, by the vote of one or both houses. The device was ruled unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983).

64. Some Bill of Rights guarantees are clearly valued as ends in themselves. Freedom of religion, for example, or the third amendment provision against quartering soldiers in private homes in peacetime, need no explanation for why they are seen as good things in themselves. The first amendment freedom of speech has long been the subject of debate between those who see it as an end in itself, and those who see it as a means of securing an underlying right to participate in political debate and activity. See M. NIMMER, *NIMMER ON FREEDOM OF SPEECH* ch. 1 (1984). Finally, the Constitution protects some things, such as firearms, clearly for their value as means to secure other ends rather than as ends in themselves. See Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69 (1986).

65. If a "state's right" is seen as ultimately belonging to the government entity itself, it will command little respect in a system of rights based upon the individual. But if it is seen as merely a necessary concept for effectuating individual rights, it must be treated more respectfully. In criticizing the concept of absolute rights, Alejo DeCervera has pointed out the importance of effective groups (including the state) to individuals: "the individual needs groups; he needs them so badly that without them he could do literally nothing but succumb . . . without groups the individual would be literally powerless" DeCervera, *Natural Law Restated: An Analysis of Liberty in HUMAN RIGHTS*, *supra* note 40, at 55, 58.

what they are.⁶⁶ Although "interpretivists," those who generally reject the recognition of antimajoritarian rights not explicitly set forth in the document,⁶⁷ have recently gained political power⁶⁸ and are well represented in academe,⁶⁹ their position is seriously undermined by provisions of the Constitution itself which seem intentionally drawn to invite expansion over time. Perhaps most prominent among these constitutional provisions is the ninth amendment.⁷⁰ If that provision does not mean that there are, or at least may be, some rights beyond those explicit in the constitutional text, it is difficult to imagine what meaning it does have.

Despite the existence of the ninth amendment and other open-ended constitutional provisions,⁷¹ opposition to expand individual antimajoritarian rights is not only strong, but quite understandable. Since the Constitution itself provides no method for deciding what new rights are to be recognized, almost any suggested expansion can be attacked as an illegitimate use of judicial power. Some interpretive guidelines must be found, and while the open-ended provisions themselves provide none, that is not to say that there are none present in the Constitution as a whole.

The most prominent theory drawing on overall constitutional themes to interpret open-ended rights provisions⁷² is that of John Hart Ely.⁷³ Professor Ely, recognizing the central importance of participation in the political proc-

66. See, e.g., Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

67. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Bork, *supra* note 66.

68. The Reagan administration has clearly articulated its commitment to this "interpretivist" school of thought, specifically to "a jurisprudence of original intention." Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455, 466 n.60 (1986).

69. The Reagan administration has chosen former academics not only for three of the last four recent Supreme Court nominations, but also for several prominent court of appeals positions. See Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 50 U. MIAMI L. REV. 913 (1986).

70. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

71. See, e.g., U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

72. Some scholars explicitly defend a jurisprudence which does not purport to interpret, but rather moves beyond, the text to permit implementation of a higher law through constitutional adjudication. See, e.g., M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982); Grey, *supra* note 66. However, some reject Professor Ely's contention that he is merely interpreting the text as a whole. Judge Bork, for example, calls Ely "a non-interpretivist whether he knows it or not." Bork, *supra* note 66, at 390.

73. J. ELY, *supra* note 51. Professor Ely's work has been the source of widespread comment, favorable and otherwise. See, e.g., *Symposium: Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

ess to the constitutional system, maintains that open-ended rights provisions should be interpreted in a "representation reinforcing" way, that is, in light of the constitutional vision of equal participation of citizens in the representative processes of government.⁷⁴ Thus, decisions of majorities which systematically harm discrete groups who are disadvantaged in the political process,⁷⁵ or which serve to skew the process itself to distort democratic outcomes, should be reversed, despite the lack of explicit constitutional language prohibiting such legislation. But where the representative process is not distorted in such a way, its results should be respected by courts, unless an explicit constitutional right is impaired.⁷⁶

Professor Ely's conclusions are largely consistent with the proposition that the Constitution creates a background right to effective implementation of constitutional results of the democratic process. In fact, his contention that courts must use open-ended rights provisions to assure equal access to the political process and meaningful opportunities for participation is absolutely essential to any defensible constitutional theory which rests upon the central importance of democracy.⁷⁷

Professor Ely, however, may be too quick to dismiss the possibility that the constitutional bias toward representational government may, in limited cases, call for the expansion of antimajoritarian rights unrelated to process. It might be said that the continued existence of a statute or practice which has come to be clearly inconsistent with the firmly established basic values of a clear majority of the community, is not an affirmation, but rather a rejection, of the concept of democratic decisionmaking. While such cases will be rare, where the community has been unable to enact its will on a particular subject, invalidation of the statute will be justified on majoritarian grounds.

As discussed above, the typical claim of a constitutional right before a court is actually a package of three claims, so intimately integrated that they are thought of as one: the claim to a particular outcome, regardless of the opinion of others; the claim to a forum to present the first claim; and the claim to effective implementation of a favorable decision. When the citizen

74. J. ELY, *supra* note 51, at 181.

75. *Id.* at 135-79. "The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending . . ." *Id.* at 151. In addition, the approach should prohibit classifications aimed at "groups we know others (specifically those who control the legislative process) might wish to injure . . ." *Id.* at 151, 153.

76. Newly fashioned, substantive individual rights should be avoided, except upon a showing that "representative government cannot be trusted." *Id.* at 183. Thus, both *Lochner v. New York*, 198 U.S. 45 (1905), and *Roe v. Wade*, 410 U.S. 113 (1973), must be rejected. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

77. Ely would use the open-ended rights provisions of the Constitution to assure that the channels of the political process are not blocked by entrenched officials. J. ELY, *supra* note 51, at 105-34.

makes a claim to the legislature, while he has no right to the outcome he seeks apart from the agreement of others, he does have a right to the latter two claims: the ability to participate effectively in the process, and the right to have constitutional majoritarian decisions effectively implemented. In the overwhelming majority of cases, the existence of a piece of legislation will be indisputable evidence that it reflects the will of the majority. There may, however, be exceptions.

Professor William Nelson has explored the history of the concept of judicial review and has noted a distinct shift in the common understanding of its nature.⁷⁸ While the power of judicial review has been seen as distinctly antimajoritarian since the Civil War (and accepted as properly so), during the early years of the republic a somewhat different view was common. People perceived courts as necessary to strike down legislative outcomes when the legislature had failed to represent the true interests of the people, when it had acted in a corrupt or merely venal way contrary to the principles of true civic virtue,⁷⁹ and where the legislature had furthered powerful, special interests rather than those of the people.⁸⁰ Under such a standard, judicial review can be seen as quite democratic after all.

Of course, this view of judicial review does not render illegitimate the subsequent use of the power to act on behalf of individuals if one defines civic virtue to include the respect for individual rights mandated by the Constitution. Even a properly representative majority of legislators might well betray the will of the people, defined to include not only those currently of voting age, but also those who have come before and whose "votes" on the question of government power were recorded in the Constitution.⁸¹ Professor Nelson's findings, therefore, do not require us to decide that either the early conception of judicial review or its modern status as a shield against

78. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States 1790-1860*, 120 U. PA. L. REV. 1166 (1972).

79. Prior to 1820:

[t]he concern of judges in early constitutional cases was with the potentiality of conflict between legislators and their constituents—with the possibility that faithless legislators might betray the trust placed in them by the people. The perceived purpose of judicial review was to protect the people from such possible betrayals, not to interpose obstacles in the path of decisions made by the people's agents in due execution of their trust.

Id. at 1177.

80. Only after 1820, when the electoral system became more democratic, and it became harder to contend that the system had betrayed the people's wishes, was judicial review commonly exercised "in order to further political, social, or economic doctrines . . . which the people had rejected in the more democratic legislative process." *Id.* at 1181.

81. Bickel's prescription that judges "immerse themselves in the tradition of our society and of kindred societies that have gone before . . .," A. BICKEL, *supra* note 31, at 236, can be seen as antidemocratic if the only relevant community is the one currently alive. That is not the case, however, if the relevant community is expanded to include those who have come before.

majorities is illegitimate. They do, however, call to our attention the fact that the actions of courts, even in deciding to strike down legislation, were not seen in the framers' time as being unrelated to the proper function of democratic processes.

The connection between Professor Nelson's view of judicial review and the theories of Professor Ely involving the "representation reinforcing" function of the courts is clear. The connection suggests that Professor Ely's concern with process should be supplemented with some mechanism by which courts, in exceptional cases, might expand substantive individual rights, but do so in a way which is basically deferential, rather than hostile, to the will of the people. The theory of constitutional interpretation put forward by Professor Harry Wellington seems well-adapted to this end.⁸²

Professor Wellington does not want to limit courts only to those rights explicitly recognized in the Constitution as understood in 1787.⁸³ However, at the same time, he sees no justification for judges who impose their own moral code upon the public.⁸⁴ He resolves this dilemma by contending that courts may read moral principles into the Constitution, but should do so in a way which reflects "conventional morality," that is, the morality of the community, rather than that of the judges themselves.⁸⁵ Professor Wellington's arguments have been widely criticized. To conservatives, his rejection of pure "interpretation"⁸⁶ is illegitimate.⁸⁷ To many liberals, his method of expanding explicit textual rights is unacceptable because of its reliance on public sentiment.⁸⁸ Both lines of argument, particularly the latter, seem to rest largely on the commonly accepted notion that rights are one thing, that majority views are another, and that the two are very dissimilar.

Recognizing the citizen's background right to effective democratic processes may serve to bridge this gap. If the citizen has a right and not merely an interest that the legislature act in response to the sentiments shared by the citizen and the majority of the community (consistent with antimajoritarian constitutional rights), then "conventional morality" becomes more than morality as that term is commonly understood. It becomes a proper

82. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 290-95 (1973).

83. Professor Wellington, for example, supports the outcome in *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Id.* at 285-95.

84. In his discussion of *Griswold*, Professor Wellington states that "conventional morality, rather than the morality of some wise philosopher, is the test." *Id.* at 293.

85. *Id.* at 243-49.

86. See *supra* notes 66-69 and accompanying text.

87. The criticism generally rests on the grounds that courts simply are in no better position than legislators to discern the basic principles to which the people adhere. See, e.g., Bork, *supra* note 66, at 389-90.

88. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-3, at 896 (1978); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 977 (1979).

measure for courts to use in assessing the extent to which legislation is properly responsive to the citizen's right to effective self-governance.

In his highly acclaimed book, *A Common Law for the Age of Statutes*,⁸⁹ Professor Guido Calabresi describes the ways in which statutes, which were once functional and reflective of the public will, can eventually lose both of these attributes and yet remain in force.⁹⁰ He advocates recognizing that in such cases, courts should declare the statute in question invalid, just as they might overrule an outdated doctrine of common law.⁹¹ This invalidation would not, however, be a declaration of unconstitutionality, but merely a statement that the court finds the law no longer serves its once proper purposes. Thus, if the court was wrong in its estimation of public will, the legislature could re-enact the law, as it could in the case of any statute which has lapsed or has been repealed. Of course, this option is unavailable where the statute has been declared inconsistent with the Constitution.⁹² Professor Calabresi contends that explicit recognition of this judicial power would reduce the temptation of courts to strike down outmoded statutes on dubious constitutional grounds since the sole alternative would no longer be to sustain a highly unpalatable enactment.⁹³ Still, Professor Calabresi would urge courts to use this new power with caution and to take great pains to be reasonably sure that a statute no longer represents the will of the community before invalidating it.⁹⁴

The relationship between Professor Wellington's thought and that of Professor Calabresi is evident. Professor Calabresi explicitly states that he is not putting forward a theory of constitutional interpretation, but rather a redefinition of the power of common law courts appropriate to contemporary legal reality.⁹⁵ Still, the constitutional overtones of his proposal are clear. Courts would obtain new powers of "judicial review," though perhaps a less powerful form than that of *Marbury v. Madison*.⁹⁶

89. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

90. Professor Calabresi wrote:

[B]ecause a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and . . . some of these laws not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape. The combination of lack of fit and lack of current legislative support I will call the problem of legal obsolescence.

Id. at 2 (emphasis added).

91. "They can use this power either to make changes themselves or, by threatening to use this power, to induce legislatures to act." *Id.* at 82.

92. *See id.* at 8-15.

93. *Id.*

94. *Id.* at 120-45.

95. *Id.* at 26-30.

96. Although these new powers of "judicial review" may be less powerful than those developed in *Marbury*, they are likely to be exercised more frequently. John Marshall's reasoning in *Marbury* (if not his actual decision) stressed that judicial review should be exercised only when it was necessary in light of a clear conflict between the statute in question and the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 178.

There has been little, if any, movement to grant courts the powers that Professor Calabresi advocates. Such a grant runs counter to widely accepted theories concerning the relative roles of legislatures and courts in the law-making process.⁹⁷ But Professor Calabresi's analysis, despite his own disclaimers, might well be used to bolster Professor Wellington's constitutional approach. Specifically, Professor Calabresi's analysis may apply to the question whether new substantive individual rights might be recognized as evolving out of open-ended constitutional provisions such as the due process clause, the ninth amendment, and the eighth amendment prohibition against cruel and unusual punishment. It may be that the best way to interpret the outer margins of some of these concepts will be to take the sentiment of the community into account, but not by merely automatically affirming any existing legislation.

At times, public sentiment has come clearly and consistently to regard some sphere of private activity as protected against government intrusion, but this attitude has not yet manifested itself in legislative action. When this happens, it may be proper for courts to incorporate this well-accepted provision as one of those rights referred to in the ninth amendment, or as an aspect of due process.⁹⁸ Thus, an active stance toward judicial review might transcend its image as antidemocratic and become a force for correcting failures of the political branches to respond to the people's sentiments.

Of course, recognizing this power to expand the list of individual anti-majoritarian rights in a way consistent with what the people would have legislated would require simultaneous insistence upon judicial caution in exercising this power. An appraisal of the popular acceptance of further restraints upon their own representatives' powers should be a genuine effort to assess, and not merely a rhetorical disguise for a judge's vision of what the people would or should prefer. Thus, Justice Marshall's articulation of what he believes would be an enlightened public view of the constitutionality of capital punishment⁹⁹ would not be a proper invocation of democratic

97. In light of possible separation of powers problems presented by his proposal, Calabresi suggests that the legislature, by statute, delegate this power to the courts. G. CALABRESI, *supra* note 89, at 114-16.

98. Similarly, a punishment once commonly seen as proportional to the crime might linger well after most of society has rejected it as excessive. This may justify a broader judicial reading of the eighth amendment's prohibition against cruel and unusual punishment. *See, e.g., Coker v. Georgia* 433 U.S. 584 (1977).

99. Concurring in *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Marshall concluded that if the public were fully informed on the issue, "the average citizen would . . . find [capital punishment] shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand." *Id.* at 369 (Marshall, J., concurring). This view is clearly, however, not what the public actually believes. Opinion polls consistently show support for the death penalty in at least some cases. *See Special Project—Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1131-32 & n.8 (1984).

values to expand individual rights. Popular sentiment, with all its defects, must be taken as it stands.

The extension of an open-ended right, even when favored by a majority, pursuant to the theory of judicial responsiveness to democratic sentiment should not occur until the majority is clearly both substantial and not likely to subside. Only when both conditions are present have the political branches failed in their duty to be responsive to public sentiment. For example, it can and has been maintained that by the early 1960's a durable consensus had emerged to support the proposition that the use of birth control devices by married couples was a matter beyond government control.¹⁰⁰ Thus, the Supreme Court's decision in *Griswold v. Connecticut*¹⁰¹ can be seen as consistent with the people's right to effective democratic government. On the other hand, although most Americans now seem to favor the right to abortion (at least in some circumstances), it is clear that in 1973 the Supreme Court could hardly have concluded that such a right had been clearly accepted by the people, even though not recognized in positive law because of some failure of the democratic process.¹⁰²

The use of a test of long-standing substantial acceptance of a new right as justification for recognizing it pursuant to the overall concept of the people's right to effective democratic processes will, of course, rarely if ever lead to invalidation of newly enacted legislation. Such an enactment will be clear evidence, at the very least, of the absence of strong public sentiment regarding it as unconstitutional. As Professor Calabresi envisions within his common-law scheme, statutes which fall will be those once representative of public sentiment, but which are now clearly rejected.¹⁰³ Once again, use of this theory allows us to distinguish *Griswold* from some other "substantive due process" cases, notably *Lochner v. New York*,¹⁰⁴ in which freedom to contract was recognized as a fundamental right.¹⁰⁵

Griswold invalidated an old statute which had fallen into disuse¹⁰⁶ and which almost certainly would not have been reenacted at the time of the

100. See, e.g., Wellington, *supra* note 82, at 290-95.

101. 381 U.S. 479 (1965) (holding unconstitutional a state prohibition of the use of contraceptives by married persons).

102. The response to *Roe* at the legislative level was a flurry of statutes attempting to salvage as much deterrence of abortion as constitutionally permissible. See, e.g., Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Belotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

103. G. CALABRESI, *supra* note 89, at 2.

104. 198 U.S. 45 (1905).

105. *Lochner*, which held unconstitutional a state's attempt to regulate the hours of workers, was overruled in cases such as *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *United States v. Darby*, 312 U.S. 100 (1941).

106. The Connecticut anti-birth control statute had apparently been the basis for only one prosecution from its enactment in 1879 to 1961, a policy which reflected public rejection of the law at least as much as it did prosecutorial disinterest. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 501-02 (1961).

decision. Although *Griswold* has been a fertile source of debate for legal theorists,¹⁰⁷ the demise of the state's power to prohibit married couples from using birth control has provoked no serious public opposition. In *Lochner*, however, the Supreme Court struck down a newly enacted piece of legislation to preserve its concept of freedom of contract. The Court was obviously not reflecting the will of the people and in no sense can the Court be said to have been correcting the failure of the legislature to be responsive to the people's settled values. This rationale may be, aside from merely indicating a personal preference for one set of natural rights over another, the only persuasive way to maintain that current law is correct in its conclusion that *Lochner* was wrongly decided,¹⁰⁸ but that *Griswold* was correct.¹⁰⁹

The background right of the citizen to effective democratic processes, then, has implications far beyond the narrow question of explaining the importance of uniform interpretation of the Federal Constitution. It provides further support for Professor Ely's emphasis on the function of the Constitution as a guarantor of equal participation in the political process.¹¹⁰ But it also suggests that Professor Ely's emphasis on process may be combined with Professor Wellington's recognition that the legislative process may fail to enact into positive law some of the community's firmly held beliefs. It may, in such cases, be proper to recognize, through the ninth amendment or some other open-ended constitutional provision, that the people have determined to limit their own lawmaking powers in some way beyond the limitations of 1787. As noted above, such decisions will rarely, if ever, invalidate recent legislation. Furthermore, courts must take care to stay within the confines of honestly assessing the firm, stable consensus of the people, rather than becoming a platform for imposition of the judge's feelings. Once again, it must be stressed that "conventional morality" cannot serve as the basis for ignoring those antimajoritarian rights which are set out in the constitutional text.¹¹¹ However, within these confines, use of the concept of a background right to effective democratic processes might well recapture the sense of judicial review as responsive to the true wishes of the community which Professor Nelson finds in early nineteenth century deci-

107. See, e.g., Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173 (1979).

108. Wellington, *supra* note 82. Some recent literature has attempted to revive strong constitutional support for property rights. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). However, much of this literature is based upon provisions such as the takings or contract clauses, rather than the due process clause.

109. The "right of privacy" enunciated in *Griswold* has been expanded to become one of the most active areas of constitutional litigation. See L. TRIBE, *supra* note 88, § 15-10.

110. See *supra* notes 72-77 and accompanying text.

111. See *supra* note 54 and accompanying text.

sions.¹¹² Ultimately, the power of courts to stand against majorities when such an attitude is called for rests upon a sense that in the final analysis, the work of courts will reflect the overall will of the community. That sense can only be strengthened by judicial recognition that the citizen's rights are not entirely limited to blocking government action.

This discussion of the overall impact of recognition of a background right to effective democratic processes on constitutional interpretation is, of course, not meant to be exhaustive. It is meant, rather, to comment briefly upon the subject, to suggest how the concept relates to theories and conclusions put forward by others, and to suggest further questions which recognition of the concept will raise and the types of answers which might be provided. The background right of effective democratic processes, which provides the best justification for uniformity in the interpretation of federal constitutional rights provisions, may also provide an important tool for other constitutional inquiries.

CONCLUSION

The sharp division of legal claims into individual rights and majoritarian interests has been helpful in the analysis of some constitutional questions, but has obscured the real connections between these two concepts. Although the individual rights which take the form of negations of government power are, of course, of great importance, the Constitution as a whole also confers upon the citizen the right to be an effective participant in shaping the community through the enactment of positive law. Within the procedural and substantive bounds set forth by the Constitution, the ability of the people to effectively implement their choices is of far greater dignity than the substance of any particular choice itself. So while the Constitution grants no positive rights to particular legislative outcomes, it does give the citizen a positive right to participate in effective political activity—subject only to the negative rights which serve to limit that right. While this positive right does not trump negative rights, its presence in the background of constitutional analysis is significant.

This positive background right provides the best explanation of why uniform interpretation of federal constitutional provisions is essential. Improper extension of an antimajoritarian right by the courts of one state would frustrate the right of the citizen to effective implementation of constitutionally permitted political choices. While state constitutions, which are products of the people's will within that state, may certainly go further in limiting state government, preclusion of majorities on federal grounds must remain within uniform standards.

112. See *supra* notes 78-80 and accompanying text.

Recognition of this background right to effective democratic processes will have an impact on the Constitution as a whole. This impact must be analyzed in greater detail. It may, for example, provide strong support for a theory of the evolution of antimajoritarian rights along the lines suggested by Professor Wellington. In doing so, it may partially restore the early view of judicial review (elaborated by Professor Nelson) as consistent with, rather than opposed to, the democratic character of the constitutional system. A Supreme Court which explicitly recognizes its obligation to insure that the will of the people is respected should find more public acceptance for its decisions on those occasions when it must enforce antimajoritarian rights.